

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

LARRY LEE GLOVER
Claimant

VS.

AUGUSTA TIRE & AUTO SUPPLY, INC.
Respondent

AND

DEPOSITORS INSURANCE CO.
Insurance Carrier

Docket No. **1,052,850**

ORDER

Respondent and its insurance carrier (respondent) request review of the March 6, 2013, preliminary hearing Order entered by Administrative Law Judge (ALJ) Nelsonna Potts Barnes. Paul V. Dugan Jr., of Wichita, Kansas, appears for claimant. David J. Bogdan, of Overland Park, Kansas, appears for respondent.

The record on appeal is the same as that considered by the ALJ and consists of the preliminary hearing transcript, with exhibits, dated January 19, 2012; the preliminary hearing transcript, with exhibits, dated March 5, 2013; and all pleadings and other documents filed of record with the Division.

The ALJ found that a blood clot which developed in claimant's right leg following right knee surgery on February 9, 2012, was related to the accidental injury that arose out of and in the course of his employment. The ALJ awarded claimant medical treatment and ordered respondent to pay outstanding medical bills related to treatment of the blood clot.

ISSUES

Respondent contends the ALJ erred "in her decision awarding medical treatment and payment of medical billings absent evidence that the condition alleged is related to and result of any work related accident."¹

¹ Application for Review at 1.

Claimant argues the Board does not have jurisdiction to review the ALJ's Order. In the alternative, claimant maintains the ALJ's Order should be affirmed.

The issues raised for the Board's consideration are:

1. Whether the Board has jurisdiction to review the ALJ's preliminary hearing Order.
2. Whether the ALJ erred in finding claimant's right leg blood clot was related to his accidental injury.
3. Whether the ALJ erred in awarding claimant medical treatment and ordering respondent to pay medical bills incurred for treatment of the blood clot.

FINDINGS OF FACT

After reviewing the evidentiary record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

Claimant described his June 29, 2009, accident as follows:

I was changing a tire out on a tractor and was putting calcium into the tire, and something had restricted the calcium from going in, so it was pumping air through a hose the size of a garden hose. And within a couple minutes, as soon as I touched the tire, it blew and threw me about 10 feet back, slammed me into the wall. I was bruised all the way around, both legs; I had to have had [sic] six staples in the back of my head.²

Claimant testified the tire struck him from his belly button down to both knees. He injured his head, legs--including both knees, hip and right wrist. Following the accidental injury, claimant was taken by ambulance to Kansas Medical Center's emergency room (ER) in Wichita, Kansas.

On September 27, 2010, claimant initiated treatment with Dr. Kenneth Jansson, an orthopedic surgeon. Dr. Jansson ordered an MRI scan of the left knee, which was conducted on October 5, 2010. The scan of the left knee revealed a complex tear of the posterior horn of the medial meniscus and the presence of early osteoarthritic changes. On November 16, 2010, Dr. Jansson performed a left knee arthroscopy with partial medial meniscectomy and patella chondroplasty.

Dr. Jansson subsequently prescribed a right knee MRI scan, which was performed on October 13, 2011. The report of the right knee scan indicated it was a normal study.

² P.H. Trans. (Jan. 19, 2012) at 6-7.

However, Dr. Jansson reviewed the MRI films and concluded “it [the right knee MRI] showed abnormal signal in the medial meniscus posterior horn,”³ most likely due to a tear.

A preliminary hearing was held before Judge Barnes on January 19, 2012. On January 23, 2012, the ALJ entered a preliminary hearing Order requiring respondent to provide right lower extremity treatment with Dr. Jansson. That Order was not appealed to the Board.

On February 9, 2012, Dr. Jansson performed a right arthroscopic partial medial meniscectomy. Post-surgically, claimant complained of right lower leg pain. Dr. Jansson ordered a Doppler study to rule out deep venous thrombosis. The Doppler study was negative.

Claimant’s right leg pain persisted and his efforts to return to Dr. Jansson were unsuccessful. On November 21, 2012, claimant went to the ER at Wesley Medical Center in Wichita. Claimant was diagnosed with a blood clot behind his right knee requiring treatment, including the anticoagulant medication, Coumadin. Claimant remained under treatment for the blood clot when he last testified at the March 5, 2013, preliminary hearing.

A prehearing settlement conference was held on October 11, 2012, following which the ALJ entered an order appointing Dr. Peter Bieri to perform a neutral medical evaluation. Dr. Bieri examined claimant on January 8, 2013. Both claimant’s history and Dr. Bieri’s opinions refer to claimant’s development of clotting in the right leg following the right knee surgery. However, Dr. Bieri did not specifically express the opinion that claimant’s blood clot resulted from his accident or the surgery necessary to treat the right knee.

PRINCIPLES OF LAW AND ANALYSIS

The Board’s review of preliminary hearing orders is limited. Not every alleged error in law or fact is subject to review. The Board has authority to review preliminary hearing Orders only the extent of the jurisdictional issues in K.S.A. 2008 Supp. 44-534a(a)(2). Those issues are: (1) whether the employee suffered an accidental injury, (2) whether the injury arose out of and in the course of the employee’s employment, (3) whether notice is given or claim timely made, or (4) whether certain defenses apply. The term “certain defenses” refers to defenses which dispute the compensability of the claim.⁴ The Board can also review preliminary hearing Orders when a party alleges the ALJ exceeded his/her jurisdiction.⁵

³ *Id.*, Cl. Ex. 1 at 1.

⁴ *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

⁵ K.S.A. 2008 Supp. 44-551(i)(2)(A).

The Board lacks jurisdiction to review the issues raised by respondent. Pursuant to K.S.A. 44-534a, the ALJ had authority to decide whether claimant was entitled to reasonably necessary medical treatment to cure and relieve the effects of claimant's right knee injury, including the development of his post-surgical blood clot. The ALJ also had the authority to order respondent to pay outstanding medical bills.

Whether an injured worker should be awarded authorized medical treatment is not an issue denoted as jurisdictional in K.S.A. 44-534a. The Board has repeatedly ruled in the past, and continues to hold, that issues regarding medical treatment, including change of physician requests, are not jurisdictional in nature and are accordingly not subject to Board review of a preliminary hearing Order.⁶

The Court of Appeals in *Allen*⁷ held:

Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.

When the record reveals a lack of jurisdiction, the Board's authority extends no further than to dismiss the action.⁸

CONCLUSION

This Board member finds that the ALJ did not exceed her authority; that respondent has not raised a jurisdictional issue; that the Board lacks jurisdiction to review the issues raised by respondent; and that, accordingly, respondent's application for Board review should be dismissed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁹ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member,

⁶ See *Hubbard v. Wesley Medical Center, LLC*, No. 1,040,850, 2008 WL 5122323 (Kan. WCAB Nov. 7, 2008); *Spears v. Penmac Personnel Services, Inc.*, No. 1,021,857, 2005 WL 2519628 (Kan. WCAB Sept. 30, 2005); *Briceno v. Wichita Inn West*, No. 211,226, 1997 WL 107613 (Kan. WCAB Feb. 27, 1997); *Graham v. Rubbermaid Specialty Products*, No. 219, 395, 1997 WL 377947 (Kan. WCAB June 10, 1997).

⁷ *Allen v. Craig*, 1 Kan. App. 2d 301, 303-04, 564 P.2d 552, *rev. denied* 221 Kan. 757 (1977).

⁸ See *State v. Rios*, 19 Kan. App. 2d 350, Syl. ¶ 1, 869 P.2d 755 (1994).

⁹ K.S.A. 2008 Supp. 44-534a.

as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.¹⁰

WHEREFORE, the undersigned Board Member finds that respondent's application for Board review of the March 6, 2013, preliminary hearing Order entered by ALJ Nelsonna Potts Barnes, should be, and hereby is, dismissed for lack of jurisdiction.

IT IS SO ORDERED.

Dated this 12th day of June, 2013.

HONORABLE GARY R. TERRILL
BOARD MEMBER

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Nelsonna Potts Barnes, ALJ

¹⁰ K.S.A. 2008 Supp. 44-555c(k).